Supreme Court, U.S.
FILED

09-896 JAN 25 2010

OFFICE OF THE CLERK

No. 09A610

In The
Supreme Court of the United States

DR. BRENDA MILLS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

DR. BRENDA MILLS
Petitioner Pro Se
5824 DeGiverville Avenue
St. Louis, Missouri 63112
(314) 265-7651

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED

1. Whether the totality of the circumstances of the petitioner's attorneys' representation constituted ineffective assistance of counsel when judged against objective standards that the court should adopt as constitutionally mandated for plea bargain cases to provide guidance to the lower federal and state courts?

2. Whether the government's duty to disclose *Brady* evidence extends to the pretrial stage of plea bargaining when the evidence is of factual innocence as distinguished from impeachment evidence?

3. Whether the petitioner filed a timely motion for post-conviction relief based upon her pro se status?

PARTIES TO THE PROCEEDING

Pursuant to Rue 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Eighth Circuit.

The petitioner here and appellant below is Brenda Mills, M.D.

The respondent here and the appellee below is the United States of America.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES vii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS TO GRANT THE PETITION 10

I. THE COURT SHOULD SET GENERAL GUIDELINES FOR THE LOWER FEDERAL COURTS TO USE IN EVALUATING A LAWYER'S PERFORMANCE FOR THE PURPOSE OF DETERMINING WHETHER INEFFECTIVE ASSISTANCE OF COUNSEL HAS OCCURRED AT THE PRETRIAL PLEA BARGAINING STAGE 10

II. THIS COURT SHOULD CLARIFY THAT THE GOVERNMENT'S DUTY TO

DISCLOSE EVIDENCE FAVORABLE TO THE ACCUSED EXTENDS TO THE PLEA BARGAINING PROCESS WHERE THE FAVORABLE EVIDENCE COULD ESTABLISH THE ACCUSED'S FACTUAL INNOCENCE AND IS NOT FORECLOSED BY THE COURT'S DECISION IN *U.S. V. RUIZ* WHICH HELD THAT THE *BRADY* DOCTRINE DOES NOT APPLY TO IMPEACHMENT EVIDENCE 13

III. THIS COURT SHOULD CLARIFY THE STANDARDS FOR DETERMINING WHEN AN INARTFULLY DRAFTED POST-CONVICTION MOTION FILED BY A PRO SE LITIGANT SHOULD BE TREATED AS A TIMELY PETITION FOR HABEAS CORPUS RELIEF BECAUSE THE ISSUE WILL CONSTANTLY RECUR IN THE LOWER FEDERAL AND STATE COURTS..... 16

A. *The 2006 Motion for Reconsideration Should Have Been Treated by the District Court as a Timely Motion for Post-conviction Relief*..... 16

B. *Alternatively, the Court of Appeals Should Have Found that the Petitioner's March 3, 2003 Motion to Vacate Was Based on a Claim of Factual Innocence to Both the Charge*

For Which She Pled Guilty As Well as All Charges That Were Dismissed as Part of The Plea Bargain 19

1. The petitioner is factually innocent to the charge for which she pled guilty because no crime was committed as a matter of law and fact 19

2. The petitioner consistently maintained her innocence of the original charges that the government dismissed as part of the plea bargain..... 22

CONCLUSION 23

APPENDIX 1a

Order of the Eighth Circuit Denying Petitioner's Motion for Reconsideration (October 26, 2009) 1a

Judgment of the Eighth Circuit Denying Petitioner's Application for Appealability (July 30, 2009) 3a

Petitioner's Notice of Appeal of the Judgment of the District Court (E.D. Mo. May 26, 2009) 4a

Order Denying Petitioner's Motion for a Certificate of Appealabilty (E.D. Mo. June 29, 2009) 5a

Order Denying Petitioner's Motion to Reconsider Its Order of March 24, 2009 (E.D. Mo. May 19, 2009 ..... 6a

Order Denying Petitioner's Motion to Vacate and Set Aside Judgment or, Alternatively, to Correct Sentence (E.D. Mo. May 19, 2009) 7a

Memorandum Opinion Denying Petitioner's Motion to Vacate and Set Aside Judgment or, Alternatively, to Correct Sentence (E.D. Mo. March 24, 2009) 8a

Petitioner's Motion to Vacate and Set Aside Judgment or, Alternatively, to Correct the Sentence (March 24, 2009) 14a

Order Denying Petitioner's Motion to Reconsider Its Order of Restitution (E.D. Mo. March 22, 2006) 53a

Petitioner's Motion to Reconsider the Court's Order of Restitution (E.D. Mo. March 22, 2006) 54a

TABLE OF AUTHORITIES

Cases

Andrews v. United States, 373 U.S. 334 (1963) 18

Bousley v. United States, 523 U.S. 614 (1998)..... 19, 22

Brady v. Maryland, 373 U.S. 83 (1963)..... 14

Ferrara v. U.S., 456 F.3d 278 (3d Cir. 2006)..... 15

Hill v. Lockhart, 474 U.S. 52 (1985)..... 10

Sanders v. Clemco, 862 F.2d 161
(8th Cir. 1988) 10

Strickland v. Washington, 466 U.S. 668 (1984)..... 10, 11

U.S. v. Ruiz, 536 U.S. 622 (2002) 14, 16

Williams v. Norris, 461 F.3d 999
(8th Cir. 2006) 18

Constitutional Provisions

U.S. Const., amend. VI 8

Statutes

18 U.S.C. 1001 12

Other Authorities

Martin C. Calhoun, *Note, How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 Geo. L.J. 413 (1988) 12

Stephen P. Grossman, *An Honest Approach to Plea Bargaining*, 29 Am. J. Trial Advoc. 101 (2005) 11

Anthony E. Rufo, Note: Opportunity Lost? *The Ineffective Assistance Doctrine's Applicability to Foregone Plea Bargains*, 42 Suffolk U. Law Review 709 (2009) 11

PETITION FOR A WRIT OF CERTIORARI

Petitioner Brenda Mills, MD., respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Eighth Circuit that dismissed petitioner's motion for a certificate of appealability (App. 2) is not reported. The order of the United States Court of Appeals for the Eighth Circuit denying the petitioner's motion for a certificate of appealability (App. 4) is not reported. The memorandum opinion of the United States District Court for the Eastern District of Missouri denying the petitioner's motion to vacate, set aside judgment or alternatively, correct sentence (App. 7) is not reported.

JURISDICTION

The judgment of the Eighth Circuit denying appealability was entered on July 30, 2009. A timely petition for rehearing was denied on October 6, 2009. App. 1. On December 29, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 25, 2010. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law".

18 U.S.C. §1001 provides in relevant part:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5

years or, if the offense involves international or domestic terrorism (as defined in section 2331 [18 USCS § 2331]), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591 [18 USCS §§ 2241 et seq., 2250, 2251 et seq., 2421 et seq., or 1591], then the term of imprisonment imposed under this section shall be not more than 8 years.

STATEMENT OF THE CASE

On November 8, 2004, the petitioner, a doctor, pled guilty in federal court to a single charge, making a false statement in connection with obtaining healthcare payments from the U.S. Department of Labor, and was sentenced to six months home confinement, three-years supervised release and ordered to pay $34,000 in restitution. As a result of her guilty plea, the petitioner has also been excluded from participation in all publicly funded health care benefits programs. App. 69.

The petitioner maintains that her guilty plea was unconstitutionally tainted by ineffective assistance of counsel based primarily on misrepresentations by her attorney that he had subpoenaed critical Medicare records and government misconduct by failing to provide her critical *Brady* evidence. She also maintains that she is innocent of the single charge to which she entered a plea as well as any other charges contained in the

original and superseding indictments. Prior to her plea, she maintained that her medical identity had been stolen by a former employee, the government's confidential informant, who without her knowledge had forged her name and signature on documents and had federal Medicare and private insurance payments diverted to a bank account controlled exclusively by the confidential informant.

The confidential informant, by contrast, claimed the petitioner had orchestrated the illegal schemes and had directed the confidential informant's actions.

The petitioner was originally indicted on February 3, 2004, charged with Medicare fraud, false statement relating to health matters, and mail fraud. (App.7,8). She was charged by a superseding indictment on August 26, 2004 with two counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 1342 and nineteen counts of making false statements related to health care benefit claims submitted to medical insurers in violation of 18 U.S.C. §§ 1035 and 1032. *Id.* All of the alleged criminal acts took place in 2002. On November 8, 2004, the superseding indictment was replaced by an information alleging a single count of making a false statement to a representative of the U.S. Department of Labor. The alleged false statement was that an employee in her medical practice was a physical therapist when, in fact, the employee was not, so that the employee's services were not properly billable to the

Department of Labor in violation of 18 U.S.C. § 1001. This was the single charge that the petitioner pled guilty to on the same day the information was filed as part of a negotiated plea.

Throughout the course of the initial charges and her guilty plea, the petitioner was represented by retained counsel. Aware of the importance of the Medicare records to the government's original case as well as her defense, she directed her defense counsel to subpoena all of her existing Medicare records. Prior to entering her guilty plea, her counsel assured her that they had done so and represented to her that the return on the subpoena indicated that none of her Medicare records existed.

Similarly, the government did not produce any Medicare records as *Brady* evidence. The unavailability of her Medicare records was a critical factor in the petitioner's decision to enter into a plea bargain on the sole charge for which she pled guilty.

Prior to the original indictment of February 3, 2004, the petitioner had discovered that someone was using her name to obtain payment for medical services. In November 2003, she received remittance notices indicating that she had an active agreement with Medicare as a medical services provider. However, the notice she received in November 2003 involved a patient she had never treated. Thus, it initially appeared to her that someone had been involved with fraudulent activity involving her

identity with respect to Medicare transactions in 2003.

She then called and wrote letters alerting Medicare that there was suspicious activity associated with her Medicare account. She also notified Medicare that she had no knowledge of the patient named in the notice which had been sent to her and that the name and address on the bogus remittance was different than the one she had given on her application for approval as a Medicare provider. At the time she received notice of the November 23, 2003 transaction, she had not participated as an active Medicare provider for almost fourteen years, and she was only registered with Medicare under her former married name of "Kluttz," not "Mills."

Nearly two years passed before the issue of her Medicare records resurfaced. By this time she had pled guilty to the single charge of making a false statement in connection with a health care payment on November 8, 2004 and had been sentenced on March 4, 2005. In the first week of November 2005, she had retained a civil attorney to assist her with her longstanding quest to obtain her Medicare records, and had visited her criminal defense attorneys office at her civil attorney's request to obtain the subpoenas her criminal attorneys had told her they had issued for her Medicare records as she had requested in 2004. It was then that she learned for the first time that her criminal attorneys had

never subpoenaed her Medicare records, but only her Medicaid records which had not been the subject of the government's prosecution. When she questioned her lead attorney as to whether he had also subpoenaed her Medicare records as she had instructed, and as he had represented that he had done prior to entering the plea bargain, he now admitted for the first time that he had not subpoenaed the Medicare records

The next month, a few days after December 2, 2005, the petitioner received a belated response to her FOIA request in a letter dated December 2, 2005, over a year after her guilty plea and nearly two years since she first sought her Medicare records pre-indictment in 2003. The FOIA response included remittance notices under the name "Mills" and bore an office address of 511 Airport Road for transactions conducted in 1991 and 1992 with an effective date of 12-31-91 and an ending date of 12-30-92.

In actuality, the petitioner did not have her office at that address until 1994 when she purchased the building and had never had space at that location in any capacity prior to purchasing it in 1994. This constituted her first knowledge that additional Medicare records were in existence that should have been provided pursuant to the subpoena that she believed her attorney had issued or disclosed by the government under *Brady*. App. 33, 36-38.

Armed with the recently discovered knowledge of the government's failure to provide the federal Medicare records as *Brady* evidence and her defense counsel's failure to subpoena them, the petitioner filed a motion for reconsideration on March 6, 2006. As a *pro se* litigant, this motion was not filed in a new civil proceeding denominated a petition for post-conviction relief or habeas corpus, but was filed in the original criminal proceeding though the petitioner's ignorance. However, as the district court later found, the March 6, 2006 motion for reconsideration "substantially raised the same issues" which she raised in a subsequent §2255 motion. App. 14.

Two years after filing the motion for reconsideration, the petitioner filed a *pro se* motion in the district court to vacate her sentence and set aside the judgment on March 3, 2008 under 28 USC § 2255 and 28 USC § 2241. Although, this motion also bore the original criminal docket number, S2-4:04CR00060 (App. 15) as her 2006 motion for reconsideration, the motion to vacate was assigned a civil action number by the court, 4:08CV310. (App. 7-8) unlike the 2006 motion for reconsideration.

Believing that her 2006 motion for reconsideration was a motion for post-conviction relief, she sought to amend and amplify her claims for ineffective assistance of counsel and government misconduct in failing to provide *Brady* evidence

consisting of the Medicare records that she obtained in December 2005 in her 2008 motion to vacate her sentence and set aside the judgment.

The district denied the 2006 motion for reconsideration on March 22, 2006 without giving any reasons. App. 63. Nor did it indicate that it was a final judgment on what she believed was her initial motion for post-conviction relief. Until it became a final judgment, she believed that she could not appeal the denial of reconsideration to the Eighth Circuit.

The district court denied her 2008 motion to vacate on March 24, 2009 in a memorandum opinion (App.7) and Order (App 8). It denied the petitioner's motion to reconsider its memorandum opinion, order and judgment of March 29, 2009 on May 19, 2009. App. 5. It denied petitioner's motion for a certificate of appealability on June 29, 2009. App. 4. The petitioner thereafter filed a timely notice of appeal to the Eighth Circuit on June 29, 2009. App. 3.

The Eighth Circuit denied the petitioner's application for a certificate of appealability on July 30, 2009. App. 2. It denied the petitioner's petition for rehearing on October 6, 2008. App. 1. This court granted the petitioner an extension of time to file her petition for a writ of certiorari to January 25, 2009.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD SET GENERAL GUIDELINES FOR THE LOWER FEDERAL COURTS TO USE IN EVALUATING A LAWYER'S PERFORMANCE FOR THE PURPOSE OF DETERMINING WHETHER INEFFECTIVE ASSISTANCE OF COUNSEL HAS OCCURRED AT THE PRETRIAL PLEA BAR-GAINING STAGE.

In 1984, this court decided *Strickland v. Washington*, 466 U.S. 668, 690-96 (1984) and enunciated a two-pronged test for judging whether defense counsel provided ineffective assistance. The first prong addressed an attorney's performance. It required a reviewing court to determine whether defense counsel had acted in a deficient manner. 466 U.S. at 90. The second prong addressed the outcome. It required a reviewing court to determine whether defense counsel's deficiencies resulted in prejudice that materially affected the trial's outcome. 466 U.S. at 690-96. A year after *Strickland*, this Court decided *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) and held that the *Strickland* test applied to plea bargaining, i.e., that the ineffective assistance doctrine applied to guilty pleas. *Id.*

However, despite the creation of a standard for judging ineffective assistance of defense counsel, neither *Strickland* or *Lockhart* provided any specific

guidelines to evaluate a lawyer's performance, especially at the plea bargaining stage.

The petitioner's case presents the Court with an opportunity to provide such guidelines. As the Court is aware, plea bargains resolve the vast majority of criminal cases in the United States. See Stephen P. Grossman, *An Honest Approach to Plea Bargaining*, 29 Am. J. Trial Advoc. 101 (2005) (asserting plea bargaining disposes an "overwhelming" number of cases). Approximately ninety percent of all criminal cases settle through plea bargaining. *Id.* at 101, n.2. Moreover, on appeal, ineffective of assistance of counsel is the claim most often asserted by the convicted. Anthony E. Rufo, Note: Opportunity Lost? *The Ineffective Assistance Doctrine's Applicability to Foregone Plea Bargains*, 42 Suffolk U. L. Rev. 709, 717 (2009). As the type of claim asserted by the petitioner will always be with the courts, for this Court to provide additional guidance to the lower courts, both federal and state, would be both needed and prudent.

Strickland has been heavily criticized for its failure to articulate meaningful standards to determine what constitutes ineffective assistance of counsel. Beginning with Justice Marshall's dissent in *Strickland*, he objected to the attorney performance prong of the test, speculating that the provision would provide little or no guidance for courts or attorneys. 466 U.S. 668, 706-19 (1984) (Marshall, J, dissenting). While recognizing that it

was necessary to permit attorneys a certain degree of latitude in shaping their defense, Justice Marshall suggested that the Court could nonetheless determine specific objective standards for a number of the responsibilities of defense counsel. *Id.* at 708-709.

Commentators have also argued that the Court should adopt objective guidelines for determining attorney ineffectiveness. See, e.g. Martin C. Calhoun, *Note, How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 Geo. L.J. 413, 427-37 (1988) (critiquing *Strickland* test).

In the instant case, the petitioner raised post-conviction claims that her attorneys failed to subpoena critical Medicare records, lied to her about having done so and lied about the results of the return of the subpoena which they claimed resulted in the government asserting that such records were no longer in existence. She also alleged that they failed to interview key witnesses, to follow up leads that she gave them. For example, the petitioner learned that someone had forged her signature and used it to defraud the taxicab commission by issuing fraudulent medical examination results for a number of taxi cab drivers. She suggested that various cab drivers be interviewed as many of them had confirmed an extensive scheme to defraud the taxi commission using her stolen identity. But her

attorneys failed to interview any of the cab drivers she identified. App. 48

The petitioner also asserted in her motions for post-conviction relief that she discovered facts previously unknown to her in a sentencing memorandum filed under seal by the U.S. Attorney on March 2, 2005, approximately four months after her guilty plea, that cast doubts on the strength of the government's original case that her defense counsel had led her to believe was unassailable. The sentencing memorandum included information relative to insurance companies and alleged losses in excess of $84,000 for which the Defendant was ordered to pay restitution. The sentencing memorandum clearly stated that the government was unable to prove that the petitioner generated or received the monies listed or caused the private insurance companies to sustain an actual loss. App. 34. And yet, matters related to the petitioner's alleged defrauding of insurance companies constituted 19 of the original 21 counts of the superseding indictment. App. 55. The fact that petitioners' motions asserted that her defense counsel never discussed these inconsistencies with her at any phase of their representation strongly suggests that they were classic, infamous "sleeping attorneys," wandering through the petitioner's representation as if in a daze. App. 33.

II. THIS COURT SHOULD CLARIFY ITS *DECISION IN U.S. V. RUIZ* WHICH HELD

THAT THE *BRADY* DOCTRINE DOES NOT APPLY TO IMPLEACHMENT EVIDENCE IN GUILTY PLEA CASES TO HOLD THAT THE *BRADY* DUTY DOES APPLY IN PLEA CASES WHERE FAVORABLE EVIDENCE COULD ESTABLISH THE ACCUSED'S FACTUAL INNOCENCE OR NEGATE THE GOVERNMENT'S CASE.

The seminal constitutional case, *Brady v. Maryland,* 373 U.S. 83 (1963) articulated a rule grounded in due process mandating disclosure of material evidence favorable to the defendant.

The *Brady* rule's original formulation did not address the issue of its application to guilty pleas and their negotiation. However, this Court had occasion to address the *Brady* doctrine's applicability to an aspect of *Brady* evidence in *U.S. v. Ruiz,* 536 U.S. 622 (2002). There the Court held that the *Brady* doctrine does not apply to impeachment evidence at the plea bargaining stage. However, Justice Thomas in a concurring opinion suggested that the Court's decision in *Ruiz* left open the question as to whether a constitutional duty to provide *Brady* evidence in a guilty plea case turns in some part on the "degree of help" such information would provide to the defendant at the plea stage. *Ruiz,* 536 U.S. at 633-634 (Thomas, J. concurring).

Following this Court's decision in *Ruiz,* the First Circuit had occasion to address the issue of whether there were some critical situations to which

the *Brady* doctrine applied to the plea bargaining stage that were not foreclosed by *Ruiz*. In *Ferrara v. U.S.*, 456 F.3d 278 (3d Cir. 2006), the Third Circuit applied *Brady* to a guilty plea case where memoranda in the government's possession prepared by a U.S. attorney memorialized exculpatory information including the fact that a key government witness had recanted his story that the defendant had ordered a murder for which he was charged. Without so much as a passing reference to *Ruiz*, the Third Circuit found that the evidence in question tended to negate the defendant's guilt. *Ferrara*, 456 F.3d at 292. Based on the withholding of the memoranda from the defendant, the Third Circuit found that the government's conduct was "reckless" and "manipulative" and was so outrageous that it constituted impermissible prosecutorial misconduct sufficient to render the guilty plea involuntary. *Ferrara*, 456 F.2d at 293.

In the instant case, the petitioner alleged in her 2008 motion to vacate that the government could have obtained and was constructively aware of federal Medicare records of the petitioner that suggested identity theft. These records were inextricably bound with some of the charges that the petitioner faced before they were dismissed as part of the plea bargain that she struck. The prosecution's failure to produce them when they surfaced as part of the long overdue response to the petitioner's FOIA request is equally egregious as the

situation that the Third Circuit found outrageous in *Ferrara*.

Surely, the instant case presents an opportunity for this court to decide whether it left open the question in *Ruiz* that there may be some cases in which the evidence withheld by the government is so critical to a defendant's opportunity to prove her innocence that it renders a guilty plea involuntary. This was a question answered in the affirmative by the Third Circuit in *Ferrara* four years after *Ruiz* was decided, and it cries out for clarification and resolution by this Court. The instant case presents the Court with an opportunity to do so.

III. THIS COURT SHOULD CLARIFY THE STANDARDS FOR DETERMINING WHEN AN INARTFULLY DRAFTED POST-CONVICTION MOTION FILED BY A PRO SE LITIGANT SHOULD BE TREATED AS A TIMELY PETITION FOR HABEAS CORPUS RELIEF BECAUSE THE ISSUE WILL CONSTANTLY RECUR IN THE LOWER FEDERAL AND STATE COURTS.

A. *The 2006 Motion for Reconsideration Should Have Been Treated by the District Court as a Timely Motion for Post-conviction Relief.*

The petitioner initially raised her claims of ineffective assistance of counsel and the government's failure to provide her *Brady* evidence of factual innocence in a pro se motion styled, "Motion to Reconsider Order of Restitution" (hereafter "motion to reconsider"). This motion was filed with the district court on March 6, 2006 and raised both ineffective assistance of counsel and *Brady* claims. App. 69-71. Although it was filed more than a year following her guilty plea of November 8, 2004, it specifically stated that its basis was "newly discovered evidence." App. 67. Moreover, it noted that at least some of the newly discovered evidence was obtained from a "legal memorandum" filed by the government just two days prior to her sentencing which took place on March 4, 2005. App. 67.

Additionally, it referenced an exhibit which was a letter dated December 2, 2005, which was a response to her FOIA request for Medicare Records. App. 68.

Although the 2006 motion for reconsideration was somewhat vague in not pinpointing the precise dates that she learned of potential *Brady* evidence and ineffective assistance of counsel, the petitioner later remedied this vagueness by a second post-conviction motion filed on March 3, 2008.

It is clear that the district court did not treat the petitioner's 2006 motion for reconsideration as a

motion for post-conviction relief. However, the federal courts have long recognized that they have an obligation to look behind the label of a motion filed by a *pro se* litigant and determine whether the motion is, in effect, cognizable under a different remedial statutory framework. *See Andrews v. United States*, 373 U.S. 334 (1963). In this regard, the district court noted:

> Within one year of the date her conviction became final, petitioner filed a motion to reconsider her sentence in which she substantially raised the same issues which she now raises in her § 2255 motion. App. 14.

Given the district court's cogent observation, there is no reason why it should not have treated the motion to reconsider as a timely motion for post-conviction relief.

Believing that her 2006 motion for reconsideration was a motion for post-conviction relief, the petitioner relied on the Eighth Circuit's decision in *Sanders v. Clemco*, 862 F.2d 161, 166 (8th Cir. 1988) that Rule 58 of the Federal Rules of Civil Procedure requires all final judgments to be made on a separate document. In addition, the petitioner relied on the Eighth Circuit's ruling in *Williams v. Norris*, 461 F.3d 999, 1002 (8th Cir. 2006) that Rule 58 typically applies to initial habeas proceedings and that, consequently, the time period to file an appeal from the denial of her 2006 motion for

reconsideration did not begin until a final judgment was filed. That did not occur until the court ruled on her 2008 motion to vacate and issued a judgment and order denominated as such on March 24, 2009. App. 6.

B. Alternatively, *the Court of Appeals Should Have Found that the Petitioner's March 3, 2008 Motion to Vacate Was Timely Because It Was Based on a Claim of Factual Innocence to Both the Charge for Which She Pled Guilty as Well as All Charges That Were Dismissed as Part of the Plea Bargain.*

1. The petitioner's is factually innocent to the charge for which she pled guilty because no crime was committed as a matter of law and fact.

In *Bousley v. United States*, 523 U.S. 614 (1998) this Court held that a defendant who pled guilty and never challenged his sentence on appeal could nonetheless challenge it collaterally if the defendant can first demonstrate either "cause" and actual "prejudice" or that she is "actually innocent." In *Bousley*, the Court noted that the petitioner contended that neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged. The court went on to hold that were this contention proven, his

plea would be constitutionally invalid. *Bousley*, 523 U.S. at 609.

In her 2008 motion to vacate, the petitioner maintained that she pled guilty to making a false statement related to heath care benefits under 18 U.S.C. §1001 when no such crime had taken place. The alleged false statement was made to a representative of the U.S. Department of Labor and was that an employee of her office was a physical therapist when, in fact, that employee was not. App.. 18-19.

However, the petitioner stated in her motion to vacate that the employee was, in fact, her physical therapist and had worked as such under the supervision of the petitioner on multiple patients prior to September 30, 2002. She went on to note that she had submitted her HCFA-1500 invoice (request for reimbursement) using codes from the American Medical Association's Physician Current Procedural Terminology (CPT codes). She explained that the Health Care Financing Administration (HCFA) used CPT codes in government health care reimbursement systems and that the CPT codes were published by the American Medical Association as a uniform numerical classification of the most common treatments and diagnostic tests performed by physicians or under their supervision. App.20.

She further explained that CPT codes were relevant because physicians get paid according to

their performance or supervision of patient services. Thus, she maintained that the Department of Labor accepted and paid for physical therapy treatments pursuant to the supervisory procedural level codes as enumerated by the AMA's CPT. Petitioner maintained that she was paid less than $2,500.00 for the entire claim and less than $500.00 for the physical therapy treatments. App.20

She further noted that The CPT codes used for physical therapy (97010 and 97014) were supervisory on their face, meaning these particular treatments could be legally administered by an unlicensed employee under petitioner's supervision, and were submitted without deception. As such, the petitioner's statement identifying the employee as a physical therapist was legally correct. Consequently, the representation made to a DOL agent was not false, and the first element for proper prosecution was not satisfied by the actions and statement that the petitioner made. App.21.

She further argued in her 2008 motion to vacate that she was not required by any federal statutes, regulations, agreement, or contract term, express or implied, that as a precondition to payment, she was required to have a licensed physical therapist render hot packs and electrical muscle stimulation physical therapy treatments. App.21.

Finally, she argued that there was no material misrepresentation because the government could not claim that a license or certification of the employee performing physical therapy duties for her was required by the Department of Labor in order for her to legally to bill for the services of the person performing physical therapy for her. App. 22.

Thus, the petitioner argued that the essential elements of the crime to which she pled guilty had not been met, and her lawyers provided her ineffective assistance of counsel by permitting her to plea to this charge. App.46

The petitioner's attorneys allowed her to waive her rights to appeal the factual basis for the plea as part of the plea agreement.

2. The petitioner consistently maintained her innocence to all of the original charges that the government dismissed as part of the plea bargain.

Bousley also held that in cases where the government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges. *Bousley*, 523 U.S. at 624.

The petitioner argued in both her 2006 motion for reconsideration and her 2008 motion to vacate

that she was innocent of all of the charges that the government had dismissed as part of the plea bargain, some of which were used as the basis for the court's order that she pay restitution.

Based on the foregoing, the petitioner's case is on all fours with the principles of *Bousley*. At the time of her plea, neither she, nor her counsel, nor the court correctly understood the essential elements of the crime with which she was charged. Therefore, she was denied an essential element of due process and her plea was involuntary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted to review the judgment below.

Respectfully submitted,

Dr. Brenda Mills,
Petitioner Pro Se
5824 DeGiverville Avenue
St. Louis, Missouri 63112
(314) 265-7651

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 09-2549 Brenda K. Mills, M.D., Appellant v. United States of America, Appellee

---

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis (4:08-cv-00310-UNA)

ORDER

The petition for rehearing by the panel filed by appellant has been considered by the court and is denied.

October 06, 2009

Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

App. 2

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2549

Brenda K. Mills, M.D.,
Petitioner - Appellant
v.
United States of America,
Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:08-cv-00310-UNA)

JUDGMENT

Before SMITH, BENTON, and SHEPHERD, Circuit Judges

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

July 30, 2009

IN THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

Brenda K. Mills, M.D.,)
Petitioner – Appellant)
)
v.)
)
United States of America),
Respondent – Appellee)

NOTICE OF APPEAL

Comes now Appellant Brenda Mills, Pro Se, and files this notice of appeal pursuant to Federal Rules of Civil Procedure 22, seeking an appeal of the final judgment of the United States District Court in Cause 4:08

Respectfully Submitted,

/s/
Brenda Mills, M.D., Pro Se
5624 DeGiverville Avenue
St. Louis, Missouri 63112
(314) 265-7651

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MISSOURI
ST. LOUIS DIVISION

BRENDA MILLS, M.D.,	)	
	)	
Petitioner,	)	4:08CV310
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	ORDER
	)	
Respondent.	)	

This matter is before the Court on petitioner's motion for certificate of appealability (Filing No. 21). The Court has previously denied such a motion and declines to review that decision. Accordingly,

IT IS ORDERED that petitioner's motion for certificate of appealability is denied.

DATED this 29th day of June, 2009.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MISSOURI
ST. LOUIS DIVISION

BRENDA MILLS, M.D.,	)	
	)	
Petitioner,	)	
	)	
v.	)	4:08CV310
	)	
UNITED STATES OF AMERICA	)	
	)	
	)	
Respondent.	)	

This matter is before the Court on the motion to reconsider (Filing No. 18) the Court's memorandum opinion (Filing No. 16) and order and judgment (Filing No. 17) of March 24, 2009. The Court has reviewed petitioner's motion, as well as its opinion and judgment, and finds that the motion should be denied. Her motion filed pursuant to 28 U.S.C. § 2255 was not timely filed, and is therefore barred.

IT IS ORDERED that petitioner's motion to reconsider is denied.

DATED this 19th day of May, 2009.

BY THE COURT:
/s/ Lyle E. Strom
LYLE E. STROM, Senior Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MISSOURI
ST. LOUIS DIVISION

BRENDA MILLS, M.D.,	)	
	)	
Petitioner,	)	
	)	
v.	)	4:08CV310
	)	
UNITED STATES OF AMERICA,	)	ORDER AND JUDGMENT
	)	
Respondent.	)	

Pursuant to the memorandum opinion entered herein this date,

IT IS ORDERED that petitioner's motion to vacate, set aside judgment or, alternatively, correct sentence is denied as untimely.

DATED this 24th day of March, 2009.
BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI ST. LOUIS DIVISION

BRENDA MILLS, M.D.,	)	
	)	
Petitioner,	)	
	)	
v.	)	4:08CV310
	)	
UNITED STATES OF AMERICA,	)	MEMORANDUM OPINION
Respondent.	)	

This matter is before the Court on the motion of the petitioner to vacate, set aside judgment or, alternatively, correct sentence (Filing No. 1). This motion was filed on March 3, 2008. The Court ordered the petitioner to show cause why her 1motion should not be denied as time barred, and on April 17,2008, the petitioner filed that response. The Court directed the government to respond to petitioner's motion, and the government filed its response on July 21, 2008 (Filing No.7). Subsequently, petitioner filed her reply to the government's response on September 4, 2008 (Filing No. 107).

HISTORY

The petitioner was originally indicted on

February 3, 2004, charging Medicare fraud, false statements relating to health matters, and mail fraud. On August 26, 2004, a superseding indictment was filed, generally containing the same allegations of fraud. The petitioner subsequently entered into a plea agreement with the government (Filing No. 132 in 4:04CR60). Pursuant to this plea agreement, she executed a waiver of indictment, and on November 8, 2004, an information was filed(Filing No. 103 in 4:04CR60), which charged petitioner with one count of willfully making a false statement and representation as to a material matter to the United States Department of Labor in violation of 18 U.S.C. § 1001. Pursuant to her plea agreement, the superseding indictment was dismissed following the sentencing of petitioner on March 4, 2005. She was sentenced by Judge Catherine Perry to three years of probation, including within that three years, six months of house arrest (Filing No. 121 in4:04CR60), filed March 4, 2005. The defendant took no appeal from the entry of this judgment.

On March 6, 2006, petitioner filed a motion for reconsideration of the order of restitution (Filing No. 129 in 4:04CR60), which was denied by Judge Perry on March 22, 2006 (Filing No.130 in 4:04CR60). No appeal was taken from that order.

Subsequently, on March 3, 2008, she filed the present motion pursuant to 28 U.S.C. § 2255, docketed as Filing No. 1 in this civil case. In her present § 2255 motion, she alleges five grounds: (1)

lack of jurisdiction; (2) due process and fundamental fairness; (3) new evidence; (4) prosecutorial misconduct; and (5) ineffective assistance of counsel.

Subsequently, this case was assigned to the undersigned following petitioner's filing of a civil rights complaint (4:08CV1850) on December 1, 2008, naming the United States Attorney and many of his Assistant United States Attorneys, together with Judge Perry and other government agents as defendants. The government in its response to petitioner's § 2255motion raised the statute of limitations as a defense since this motion was filed nearly three years after the judgment of conviction became final.

The Court has now reviewed petitioner's § 2255 motion, the government's response, and her reply to the government's response, as well as her response to Judge Perry's order that she show cause why it ought not to be dismissed as being untimely filed. The Court has also reviewed the transcripts of the petitioner's plea and sentencing hearings (Filing Nos. 110 and128 in 4:04CR60). Upon a review of these matters, the Court believes that the only two issues which need to be addressed are petitioner's claim that the Court lacked jurisdiction over the charge contained in the information and whether her § 2255 motion should be denied as untimely filed. The Court finds that her claim based on due process and fundamental fairness is based on information which was available to her in March of 2006 when

she filed her motion to reconsider the order of restitution.

JURISDICTION

The information (Filing No. 103 in 4:04CR60) charges as follows: On or about September 30, 2002, in the Eastern District of Missouri, BRENDA MILLS, M.D. the defendant, in a matter within the jurisdiction of the United States Department of Labor, an agency and department of the United States, did knowingly and willfully make a false statement and representation to a material matter in that the defendant stated and represented that an employee in her medical practice was a physical therapist whereas, as the defendant well knew, that person was not a physical therapist and her services were not properly billable to the Department of Labor in violation of Title 18, United States Code, Section 1001.

During the plea hearing, the following questions were asked of the petitioner by the Court, and she made the following answers under oath:

Q. The next section has to do with the sentencing recommendations, and we have discussed those. Over on page seven and eight then, there is a section called Stipulation of Facts Relevant to Sentencing. Did you read that section carefully?

A. Yes, I did.

Q. Are the matters set out there true?

A. Yes.

Q. As to the count of conviction, it says that as part of your medical practice, you submitted a series of forms, HCFA forms detailing treatments that a patient who has the initials of CC and was a postal employee received from June, 2002, through September of 2003, and in doing that, you knew that these claim forms submitted to the Department of Labor were used to determine amounts that the Department of Labor owed for the medical treatments of that patient. Is that true?

A. Yes.

Q. It says those forms included billings for physical therapy, and that around September 30th of 2002, you met with a nurse who was working for the Department of Labor and was evaluating the medical services for this patient's treatment, and that you told that nurse who worked for the Department of Labor that one of your employees was a physical therapist. Is that what you told her?

A. Yes.

Q. It says here that was a false statement, that person was not a physical therapist, and you made this false statement to the Department of Labor person. Is that true?

A. That is correct.

Q. And you understood that that was material to the Department of Labor, and you did that knowingly and intentionally, is that correct?

A. Yes.

Q. It then says that you agree that the loss resulting in the criminal activity was more than $30,000 and less than $70,000, and that's as to the payment of CC, is that correct?

A. Yes.

THE COURT: Doctor Mills, what you have told me in answering my questions under oath here today and in signing this plea agreement is sufficient for me to accept your guilty plea, but I have not done that yet. You still have a chance right now to change your mind. This is your last chance, and I want to make sure. Do you want to go through with this guilty plea?

THE DEFENDANT: Yes.

THE COURT: Has anyone threatened you or forced you to make you plead guilty?

THE DEFENDANT: No.

THE COURT: Are you doing this of your own free

will?

THE DEFENDANT: Yes.

(Tr. 18-19; 21, Filing No. 110).

Her present contention appears to be that these answers were not true. However, she understood the questions; she understood the nature of the charge; she understood that the statement she had made to the United States Department of Labor was false, and that it related to a material matter; and she subsequently entered a plea of guilty to that charge. Under these circumstances, there is no merit to her claim that the Court lacked jurisdiction for the crime charged in the information.

TIMELINESS

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) (Pub.L. 104-132, 110 Stat. 1214) imposed among other things a one-year statute of limitation on motions seeking to modify, vacate, or correct federal sentences. *See Johnson v. United States*, 544 U.S. 295, 299, 125 S.Ct. 1571, 161 L.Ed.2d 542 (2005). As relevant to this motion, that year would commence to run either from (a) the date on which the judgment of conviction becomes final (in this case, March 14, 2005), or (b) the date on which the facts supporting the claim or claims presented could have been discovered through exercise of due diligence. *See* 28 U.S.C. §

2255(f)(1)(4). Within one year of the date her conviction became final, petitioner filed a motion to reconsider her sentence in which she substantially raised the same issues which she now raises in her § 2255 motion. Therefore, she had sufficient information at that time upon which she could make the claims that she had received ineffective assistance of counsel or had been the subject of prosecutorial misconduct. Her due process and fundamental fairness claim is essentially premised on these two claims. However, her motion was denied by Judge Perry on March 22, 2006, and she perfected no appeal, waiting nearly two years to file her § 2255 motion. The Court finds that the motion is untimely filed, and it should be denied. A separate order will be entered in accordance with this memorandum opinion.

DATED this 24th day of March, 2009.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA,	)	
Plaintiff/Respondent,	)	
v.	)	Docket No. S2-4:04CR00060
BRENDA MILLS, M.D.	)	
Defendant/Petitioner.	)	

Motion to Vacate Sentence, Set Aside Judgment or Alternatively, Correct Sentence

Comes now the Defendant Brenda F. Mills, Pro Se, and files her Motion to Vacate, Set Aside Judgment or to Alternatively Correct the Sentence imposed in this cause on March 4, 2005. The Honorable Catherine Perry sentenced the Defendant to 6 months home confinement, 3 years supervised release, and ordered the Defendant to pay $84,000 in restitution. Defendant Mills prays for an order from this Court which would permit the withdrawal of her guilty plea. Defendant asserts that her plea was obtained through coercion, and was neither intelligent or voluntary. The Defendant entered her plea of guilty to making a false statement to avoid being convicted of additional and more serious

crimes while being denied the opportunity to defend herself. Defendant further contends that the actions for which she entered her plea were not illegal, and therefore not punishable by the District Court.

The government's confidential informant had stolen the Defendant's medical identification information (Medicare provider number and DEA number) and used that information to engage in illegal schemes and operations unknown to the Defendant. When exposed, the CI explained that the Defendant had created the illegal plans and schemes and that the Defendant had ordered the CI's actions. The government neglected to corroborate the CI's version of events although CI had a history of mental illness and a criminal record. Prosecutors, therefore, should have known that the information obtained from the CI was probably false and definitely unreliable. Nonetheless, federal prosecutors and other government authorities concealed the actions of the CI which indicated that the CI had acted without the Defendant's knowledge or participation.

If allowed access to Medicare records entitled to the Defendant, the Defendant could have shown that her records had been tampered with. The government published fraudulent information which was relied upon by the Court and others, and without the benefit and access to this federally held data, the Defendant was unable to intelligently

comment on or disprove the accusations made against her.

Defendant exercised due diligence by requesting access to this information during the investigation and before being indicted. Prosecutors, however, knowingly withheld Medicare records and other information which was favorable to the Defendant. The dates and address on Defendant's initial application for approval as a Medicare Provider are missing and fraudulent dates and address were created in an attempt to cover-up government wrongdoings as reflected by back dating. Defense attorneys neglected to subpoena these vital records, but misrepresented to the Defendant on several occasions that they had. Misconduct by prosecutors and federal agencies, and the performance deficiencies of defense attorneys caused the Defendant to be deprived of the Constitutional guarantees of notice, confrontation, compulsory process and ineffective assistance of counsel. Violations of due process abridged the right of the Defendant to properly defend herself.

Wherefore, the Defendant challenges the Court's sentence and judgment pursuant to Title 28 USC 2255, Title 28 USC 2241, and the provisions of the United States Constitution. Defendant moves the Court to Vacate, Set Aside, or Alternatively Correct the Sentence imposed on March 4, 2005. Defendant seeks any other and all available relief which the Court may dispense, submitting her

Motion on the grounds of 1) jurisdiction, 2) due process and fundamental fairness, 3) new evidence, 4) prosecutorial misconduct, and 5) ineffective assistance of counsel.

Ground 1: Jurisdiction

The Court was without proper authority and had no jurisdiction to punish the Defendant for a criminal act unless there was proof that a crime had been committed and that the Defendant was responsible for that crime. The Defendant's statement identifying an employee as a physical therapist was not false, was not material to any Department of Labor interest, and did not present an existing interest at the time the statement was made. The Defendant was not under any legal duty to provide a licensed physical therapist to administer physical therapy treatments that could be legally administered by an unlicensed employee under Defendant's supervision, and her statement was not deceptive or legally false. Therefore, no crime had been committed and the Court did not have authority to subject the Defendant to its rule when she had not violated any federal law. Summarily, the District Court lacked subject matter jurisdiction to impose sentence and judgment on the Defendant unless her actions are in violation of a federal crime. [FN1]

a) Defendant's representation was not a crime.

According to the Information, the Defendant identified the employee that administered hot pack and electric muscle stimulation treatments as her physical therapist. The Defendant was not in violation of any law, statute or legal duty as there were no existing Federal Employment Compensation Act program requirements, rules or regulations which required Defendant Dr. Mills to provide that supervisory procedural level physical therapy treatments(97010 and 97014) be performed by a licensed physical therapist as a precondition to payment.[FN2] Neither was defendant in violation of any existing contract term, implied or expressed, that required her to have these supervisory procedural level physical therapy treatments(97010 and 97014) be performed by a licensed physical therapist as a precondition to payment.[FN2] The representation was not legally false.[FN2] Since the Defendant was under no legal duty to provide a licensed physical therapist to render supervisory procedural level physical therapy treatments, the Defendant committed no crime by her statement identifying her employee, and likewise, committed no crime by the manner in which Postal employee Choice Clark was rendered physical therapy treatments nor in the manner which physical therapy treatments were billed (97010 and 97014).

b) Defendant's actions lacked essential elements: intentional misrepresentation, existing interest, and materiality.

The United States Attorney's Manual specifically states the required elements for proper prosecution for the offense of making a false statement. The first of these elements is the requirement that the representation be false (an intentional representation). In the case at hand, the Defendant's statement to the Department of Labor agent was actually true in fact and true in law as well. Defendant's employee was in fact her physical therapist and had worked as such under the supervision of the Defendant on multiple patients prior to September 30, 2002. Defendant Mills submitted her HCFA-1500 invoice (request for reimbursement) using codes from the American Medical Association's Physician Current Procedural Terminology (CPT codes). Health Care Financing Administration (HCFA) uses CPT codes in government health care reimbursement systems. CPT codes are published by the American Medical Association as a uniform numerical classification of the most common treatments and diagnostic tests performed by physicians or under their supervision. CPT codes are material because physicians get paid according to their performance or supervision of patient services. The Department of Labor accepted and paid for physical therapy treatments pursuant to the supervisory procedural level codes of 97010 and 97014 as enumerated by the AMA's CPT. Defendant was paid less than $2500.00 for the entire claim and less than $500.00 for the physical therapy treatments (97010 and 97014). *See remittance notice*

on CC attached hereto as exhibit A13-A34 and exhibit B26-B34. The CPT codes used for physical therapy (97010 and 97014) were supervisory on their face, meaning these particular treatments could be legally administered by an unlicensed employee under Defendant's supervision, and were submitted without deception. As such, the Defendant's statement identifying the employee as a physical therapist was legally correct. Therefore, the representation made to DOL agent was not false, and the first element for proper prosecution is not satisfied by the actions and statement made by Defendant Mills.[FN3]

The next element that there be an existing and present interest at the time the statement is made is unsatisfied. The USAM makes it clear that a future interest is insufficient to justify prosecution for Making a False Statement. The Information states that Defendant Mills committed the offense by her misrepresentation on September 30, 2002. However, Defendant Mills was under no federal statutes or regulations, agreement, contract term expressed or implied on September 30, 2002, whereby as a precondition to payment, she was required to have a licensed physical therapist render hot packs and electrical muscle stimulation physical therapy treatments. Defendant Mills did not submit an invoice (request for payment from DOL) until March 19, 2003, several months after the said representation to DOL agent on September 30, 2002. *See remittance notices on CC attached hereto as*

exhibit A13-A34 and exhibit B26-B34 DOL had a future interest at best, and therefore, prosecution is improper according to the USAM Criminal Resource Manual. [FN4]

Finally, the misrepresentation must be material. The government cannot claim that the license or certification of the physical therapist was material or that the credentials of a physical therapist had an affect on the payment requested and paid to the Defendant for services rendered to Choice Clark. DOL accepted Defendant's invoice, approved and denied portions of Defendant's itemized bill for physical therapy services (97010 and 97014), with no reference to the qualifications of her physical therapist. *See remittance notices on CC attached hereto as exhibit A13-A34 and exhibit B26-B34*. As such, defendant's statement had no affect or potential affect on the decision to approve or deny payment for physical therapy services (97010 and 97014). [FN5] Had license been a determining factor, DOL surely would have made reference before issuing final payment to Dr. Mills many months after the alleged misrepresentation in September 2002.

Ground 2:
Violations of Due Process
and Fundamental Fairness

Deprivation of Fundamental Due Process Rights

1) Federal Government had a duty to maintain accurate records and to make Defendant's personal records accessible to the Defendant upon her demand.

The United States Constitution provides that certain rights be afforded to the individual accused of a crime. The Defendant contends that those very rights were denied throughout the progression of this case. The federal government must concede that it had a duty to maintain Medicare records. This would include their ability to access information on an active or inactive provider agreement, and the provider number assigned to each provider. This information must be maintained with accurate dates of issue and expiration. The duty must also require that the government keep accurate records of all activity and transactions corresponding to an individual provider.

The Defendant, however, has not received the basic information which would have been required for approval as a provider, and still awaits access to complete and accurate documentation. Being deprived of the right to be fully and truthfully informed prevented Defendant Mills from presenting a quality defense and continues to encumber her efforts in all matters. Prosecutors were allowed to manipulate evidence so that Defendant never had a fair opportunity to gather the necessary information, witnesses, or documents needed to understand the nature of the numerous and varied illegal acts and

schemes for which she was investigated and accused. Keeping the Defendant ignorant allowed prosecutors to jump and bounce through undefined boundaries of confused facts that prosecutors seemed to make up at will. Prosecutors would make accusations, but when the Defendant began to investigate or respond to that act or event, the prosecutors would abandon those allegations and simply move on to something else.

2) The federal government had a duty to safeguard official federal records.

Federal agencies issued the Defendant's Medicare provider and DEA numbers, and had a duty to safeguard and to protect the Defendant's personal and professional information. All data collected by the government in regard to the application and approval of Defendant as a Medicare provider and all activity corresponding to that assigned provider number must be maintained with integrity and accuracy. No outside party should have been able to access the Defendant's account without the Defendant's consent, and if such a breach occurred, the government had a duty to notify the Defendant of said breach. *See attached hereto as exhibit A51-A54.* Had governmental agencies complied with their own stated policy and practice, the CI would not have been able to successfully carry out her illegal scheme using the Defendant's stolen identification information. *See attached hereto as exhibit A51-A54.* The integrity of federal records

would not have been compromised and today would not reflect that the Defendant participated as an active provider from 1991-1992 from an address she did not assume until 1994. *See attached hereto as exhibit A48-A49 and exhibit A50.* The government violated the Defendant's due process by allowing others to tamper with records concerning the name, address and communications between the Defendant and Medicare. *See attached hereto as exhibit A48-A49.* Defendant's due process rights were further violated when FOIA published erroneous information, and refused to change their records to correct their errors. *See attached hereto as exhibit A48-A49.*

3) Defendant exercised due diligence

The Defendant exercised due diligence at every opportunity to preserve her rights. The Defendant is still awaiting access to her file and copies of documents to which she is entitled, although she has exhausted all administrative remedies. The Defendant has evidence which shows that she made timely telephone calls, sent certified letters, expressed concerns to her legal representatives, wrote objections to the Court, filed post-conviction motions and submitted all available appeals to the Department of Health and Human Services and the Office of Inspector General. *See attached hereto as exhibits A42-A47; exhibit B1; exhibit B24-B25; Exhibit B16-B18; Exhibit A1-A120.* Unfortunately, the Defendant continues to wait for

the records in the possession of federal authorities as the Defendant has claimed that these records would exonerate her. *See attached hereto as exhibit B45.* The denial of her request for these entitled records and the continued violations of the Freedom of Information Act and Privacy Act of 1974, the HIPAA of 1996 and the Inspector General Act of 1978, prevented the Defendant from defending herself against criminal charges. *See exhibit A10-A11.* The absence of this information caused the Defendant's coerced plea of guilty and has resulted in losses of life, liberty and property.

4) Defendant incorporates by reference her appeal to the Department of Health and Human Services dated August 23, 2006, Docket No. C-06-93, Decision No. CR1461

In November 2003, Defendant received remittance notices indicating that she had an active agreement with Medicare as a provider. *See attached hereto as exhibit A42-A43.* Defendant Dr. Mills, however, had not participated in an active provider agreement with Medicare for almost fourteen years. She called and wrote letters alerting Medicare that there was suspicious activity and improprieties associated with her Provider number 000005300. Defendant Mills notified Medicare that she had no knowledge of the claimant named in the notice which had been sent to her, and the name and address used was different than the one she had given on her application for approval as a Medicare

provider. Dr. Mills requested access to her complete file and stated that this information was needed for her defense in Court matters. *See attached hereto as exhibit A14-A47.*

Medicare, however, ignored all communications from the Defendant, including her certified letters, and the lack of access to her Medicare provider file forced her into entering a plea of guilty to avoid greater harm. As a result of her plea of guilty, the Defendant was additionally excluded from participation in all publicly funded health care benefits programs. The Office of Inspector General increased Defendant's exclusion from 5 to 10 years for the sole reason that she appealed the initial decision of exclusion. *See attached hereto as exhibit A1-A120.* OIG further violated Defendant's rights to due process of law when OIG based its decision on allegations rather than proven facts or admissions made in the Defendant's plea. Losses related to the offense of Making a False Statement were substantially less than $5000, as proven by U.S. Department of Labor Fiscal Officer *Exhibits A1-A120.* Due process violations are fully detailed in referenced appeal of August 23, 2006.

5) **Postal Inspector had a duty to prevent unauthorized diversion of Defendant's mail.**

The government's confidential informant diverted mail to an unauthorized Post Office Box in Defendant's name to conduct her illegal activities. *See attached hereto as exhibit A51-A54.* Postal services were negligent in allowing Defendant's mail to be sent to an address she knew nothing about. This Post Office Box was opened by CI. *See attached as exhibit B35-B36.* Postal Inspector had a duty to notify the Defendant of CI's fraudulent acts.

6) Court proceedings failed to afford Defendant due process of law.

The Court denied the Defendant of her due process rights of notice, compulsory process, confrontation and fundamental fairness in the manner in which her case progressed through the various stages of the judicial process. The Court ordered the Defendant to pay restitution of $84,000 although the DOL claim paid gross amount of less than $2500 and less than $500 for physical therapy treatments.[FN16] There are no connections or government nexus between DOL and private insurance companies.

What Medicare Records Would Have Shown

Medicare records would have shown that CI and unknown others were operating a medical identity theft fraud ring using the stolen medical identification information of Defendant Brenda Mills, M.D. and that this was not a co-conspiracy.

Medicare records would have shown that Defendant without knowledge or participation had become involved in a scheme created by CI and unknown others to defraud insurance companies. CI and unknown others would submit false claims to private and government entities to collect payment for non rendered medical services. *See attached hereto as exhibit A52.* Using stolen medical identification information of Defendant Brenda Mills, M.D. together with other information obtained while being part time employed in Defendant's medical office, CI and unknown others were able to conduct their illegal business from home/elsewhere as if they were the true Brenda Mills, M.D. *See attached hereto as exhibit A51-A54.* Phantom name (Brenda K. Mills, M.D.) was created by CI and phony clinics(Family Medical Clinic/Family Practice) were used so that CI unknown others could distinguish their unlawful practice from that of Defendant's. *see attached hereto as exhibit B49.* CI kept this from Defendant by diverting mail to an unauthorized Post Office Box. *See attached hereto as exhibit A51-A54.* CI managed to open bank accounts, cash checks, and receive wire transfers as if she were Brenda Mills, M.D. without the true Brenda Mills, M.D. ever knowing. *See attached hereto as exhibit B50.*

Medicare records would have opened up the door to the fraudulent transactions that were being conducted with the private insurance companies in the name of Brenda K. Mills, M.D., i.e., ability to

trace the banks involved and bank accounts, payments, checks endorsements and forgeries.

Medicare records would have clearly shown that Defendant Brenda Mills, M.D. and Brenda K. Mills, M.D. were not the same person. All references in the search warrant were to the fraudulent claims submitted to private insurance companies by Brenda K. Mills, M.D. *See attached hereto as exhibit B49.* Medicare records would have shown that the search warrant had been executed at the wrong office. Medicare records would have shown that Brenda K. Mills, M.D. was the government's CI, forging Defendant's handwriting as such. *See attached hereto as exhibit B20-B23.*

Ground 3: Newly Discovered Evidence

Subsequent to her sentence, Defendant obtained newly discovered evidence which would have changed the Defendant's decision to enter a guilty plea and the outcome of this case. This newly discovered evidence could not have been obtained by the Defendant prior to her sentencing despite the Defendant's due diligence. The newly discovered evidence includes: 1) Records provided by FOIA representative that contained fraudulent, incomplete and inaccurate information which was used by federal prosecutors in the prosecution of the Defendant. *See attached hereto as exhibit A48-A49.* 2) Subpoena prepared by defense counsel which improperly named the receiving agency and further

proves that evidence necessary for Defendant's defense was never served. *See attached hereto as exhibit B7.* 3). Statement of a federal agent indicating improper withholding of favorable evidence to the Defendant and knowledge that others, not Defendant, were responsible for the crimes for which the Defendant had been charge. *See attached hereto as exhibit* B15.4) Memorandum filed by AUSA which was intentionally concealed from the Defendant containing new evidence presented to the Judge for sentencing purposes but never shared with the Defendant, and admission of prosecutor's inability to prove elements against the Defendant. *See attached hereto as exhibit A64-A72.*5). Other Court documents showing misrepresentations made to the Defendant by her attorneys and others. *See attached hereto as exhibit B 44-B46.*

The newly discovered evidence will show that Defendant's plea was obtained without the Defendant being fully and truthfully informed of the offenses for which she was charged and the consequence of entering the plea. Newly discovered evidence will also show that the Defendant's plea was not voluntarily made because the Defendant believed, as any reasonable person placed in Defendant's circumstance would have believed, that she had no other alternative but to accept plea negotiated by her attorney or else suffer additional and more severe punishment for the crimes of others.

Newly discovered evidence will also establish that material matters and evidence were wrongfully withheld, concealed and misrepresented. Further, that relevant and material documents were altered and tampered with to cover up government wrongdoings. As a result of , and but for the aforementioned deprivation of rights guaranteed by the U.S. Constitution, federal statutes, acts and agencies, the Defendant would not have suffered irreparable harm.

Finally, newly discovered evidence will show ineffective assistance of counsel in that her defense attorneys failed to properly investigate, prepare, and advise the Defendant at a standard of professionalism accepted in the legal community where this case was heard and in the community where the Defendant resides.

Ground 4:
Prosecutorial Misconduct [and]
Obstruction of Justice

The sentence and judgment of the Court should be vacated, set aside or alternatively corrected because federal prosecutors engaged in prosecutorial misconduct, thereby obstructing justice. Members of the United States District Attorney's office had knowledge of, and participated in multiple acts of misconduct with the intent to deprived the Defendant of her constitutional rights. While prosecutors zealously investigated and

prosecuted the Defendant, they also zealously did whatever they deemed necessary to assure a conviction and to prevent the Defendant from having a fair opportunity to defend herself. As prosecutors violated and ignored legal and ethical standards, they intentionally obstructed justice. The acts of the various federal agencies together abridged the Defendant's right of notice and to be truthfully and completely informed. Federal authorities knew or should have known of the violations of due process and multiple acts of deceit as they mounted. Permanent records in the possession of federal authorities contained fraudulent information, however, the Defendant was not allowed comment on, or to make changes to reflect accuracy. *See attached hereto as exhibit A48-A49.* Case law and other established authority make it clear that the U.S. District Attorney is responsible for the actions of federal administrative agencies in a federal prosecution, and therefore, federal prosecutors are imputed to have knowingly withheld, concealed, altered and misrepresented material evidence causing the Defendant the coercion of Defendant's plea of guilty. [FN8] [FN10]. It is also reasonable to infer that prosecutors tampered with federal records in an attempt to cover up their wrongdoings.[FN8] *See attached hereto as exhibit A48-A49.*

The letter dated December 2, 2005, summarily confirms that Defendant Mills' rights to access, to accurate information, and to be safeguarded from abuse were violated by the manner in which

Medicare, DEA, and other federal files were handled by the government officials charged with that responsibility. *See attached hereto as exhibit A48-A49.*

Withheld Evidence

Despite the Defendant's numerous requests for her Medicare records, federal prosecutors knowing that full and truthful disclosure of information contained in Medicare files, and information concerning their CI, withheld access knowing that their CI had committed numerous crimes using the Defendant's stolen medical identification information, and that Defendant was being held responsible for criminal acts she knew nothing about. They withheld information of forgeries, fraudulent bank accounts, electronic transactions, fraudulent taxi cab examination reports, and many other acts of deception and fraud. The CI had four bank accounts at the same bank as Defendant. Bank accounts in name of Brenda K. Mills, M.D. were withheld.

Prosecutors withheld knowledge that CI was operating a narcotics ring out of Defendant's medical office and federal agents did not believe Defendant Brenda Mills, M.D. actually existed, but that CI was fraudulently signing her name to narcotic prescriptions. *See attached hereto as exhibit B15.*

Concealed Evidence

Prosecutors concealed Defendant's Medicare account provider number as well as other information which would have proven the defendant was not guilty of the crimes charged.

Prosecutors forced Defendant to submit handwriting exemplars, but then concealed the fact that they knew someone other than the Defendant had wrongfully endorsed checks from Medicare and private insurance companies and had forged the Defendant's name in an identity theft fraud operation.

Misrepresented Evidence

Prosecutors lied in a communication in discovery stating no CI had been used in the investigation and prosecution of the Defendant, although in the search warrant of Jan. 24, 2003, CI was used to obtain probable cause. *See attached hereto as exhibit B45 and exhibit B48.* This intentional misrepresentation by the prosecutor was done to avoid disclosure requirements.[FN9] Prosecutor James Crowe stated to Defendant that there were no Medicare records bearing the Defendant's name or provider number although the information was in his possession. Federal prosecutors, also misrepresented that evidence contained in spreadsheets were given to Judge Perry for her consideration in sentencing, however, Judge Perry stated at the sentencing hearing that she had never seen spreadsheets. *See attached hereto as*

exhibit A57-A60. Prosecutors denied having the endorsed checks and drafts from private insurance companies corresponding to the claims submitted by Brenda K. Mills, M.D. contained in the PSR although said information was within their possession and control.

Prosecutor James Crowe misrepresented to the Court that Defendant had submitted a series of HCFA-1500 claims forms to DOL from June 2002 through September 2003. Prosecutor knew or should have known that this was not true. Prosecutor James Crowe misrepresented to the Court that physical therapy treatments were not properly billable to DOL. Prosecutor knew or should have known that this was not true. Prosecutor James Crowe misrepresented to the Court that the alleged false statement was material to payment. Prosecutor knew or should have known that this was not true.

The Cover up

In a letter dated December 2, 2005, Defendant received her first and only response to her many requests for Medicare information. This letter contained incomplete and inaccurate information. More importantly, it contained fraudulent information, confirming that improprieties and erroneous information was intentionally entered onto Defendant's official records. *See attached hereto as exhibit A48-A49.* Medicare must have an original

application bearing Defendant's official name, address and other personal information by which her account was opened. Defendant applied and was approved to become a Medicare provider in 1985 in name of Brenda M. Kluttz, M.D. at 7520 Natural Bridge, and was assigned the provider number of 000005300. *See attached hereto as exhibit A41.* This letter dated December 2, 2005, from Medicare has Defendant in name of Brenda M. Mills, M.D., 511 Airport Road; practice and pay to name and address of Brenda Mills, M.D., 511 Airport Road,, with an effective date of 12-31-91 and end date of 12-30-92. *See attached hereto as exhibit A48-A49.* This could not be correct. Defendant has never been a Brenda M. Mills, M.D. Defendant was not licensed to practice medicine in name of Brenda Mills, M.D. in 1991, therefore she could not have been a Medicare licensed provider in name of Brenda Mills, M.D. in 1991. Defendant had no relation to 511 Airport Road in 1991 as she did not purchase or move into that location until 1994. *See attached hereto as exhibit A50.* The Medicare records had to have been backdated, conclusive evidence of fraud, intent and deceit on the part of federal authorities. Even the CI could not have known of that address until after 1994. Despite numerous appeals, DHHS-OIG in last correspondence of March 23, 2007, was unable to produce documents to show how the numerous name and address changes took place, and how Defendant got a practice address and pay to address at a location she had no knowledge of in 1991. *See attached hereto as exhibit B43.* According to

Medicare rules, changes of names, addresses, etc., require an original signature. *See attached hereto as exhibit B37.* Also, DHHS-OIG was unable to locate their own documents that were found in the boxes at the U.S. Attorneys office amongst items they confiscated from CI's house in a raid. *See attached hereto as exhibits A51-A54.* The letter from Medicare of December 2, 2005, also stated Defendant's account was closed 12-30-92, although remittance notices Defendant received in 2003 and 2004 stated Defendant had an active provider agreement. *See attached hereto as exhibit A48-A49 and exhibit A42-A43.* DHHS-OIG is unable to produce a copy of this active provider agreement. It is evident, in an effort to cover up their knowledge of Medicare records which had been altered, federal prosecutors or persons under their control, created a fraudulent record attributed to Defendant.

Ground 5: Ineffective Assistance of Counsel

In a letter dated June 1, 2005, the Defendant received notice from the Department of Health and Human Services that she had been excluded from eligibility to participate in the Medicare, Medicaid and all Federal health care programs as a consequence of her conviction for the offense of Making a False Statement. In an effort to respond to the exclusion notice, Defendant Mills made arrangement to review her legal file in the possession of her attorneys Scott Rosenblum and John Rogers. Examination of her file revealed that

her attorneys had failed to fully disclose to her evidence of which she was entitled, had misrepresented material facts to her, and had otherwise failed to provide competent representation. As a result of the legal representation provided to Dr. Mills in this cause, Defendant Dr. Mills was denied the Constitutional right to effective assistance of counsel as provided by the Sixth Amendment to the United States Constitution.

The inadequate performance of defense lawyers, Scott Rosenblum and John Rogers, caused the Defendant's violation of due process of law, rights to notice and confrontation, compulsory process, equal protection under the law and fundamental fairness.[FN13]. The Defendant also discovered that her attorneys had failed to properly investigate, research and present a bona fide defense against the charges brought against her. Witnesses identified by the Defendant as necessary had not been interviewed, and defense lawyers failed to follow through on favorable evidence which was available.

But for the negligence, indifference and substandard performance of her legal representatives, the Defendant would not have entered a plea of guilty to the offense of making a false statement and would not have sustained the consequential losses of life, liberty and property.

Defendant asserts ineffective assistance of counsel, and claims (1) that defense counsel's performance fell below an objective standard of reasonableness and (2) that deficiency in her defense counsel's performance caused her to be prejudiced. [FN11].

1) Attorneys failed to Subpoena Records Vital to Defendant's Defense

Despite being informed that Medicare records were vital to her defense, attorneys Scott Rosenblum and John Rogers failed to properly subpoena and obtain said records for use in Defendant's case. Defendant Mills repeatedly reminded her attorneys that these records would prove that she was a victim of identity theft and that she had not participated in any criminal activity. Defendant strongly believed that a thorough investigation into her Medicare records would expose the parties responsible for all of the crimes committed in her name, and further would ultimately prove Defendant's innocence. In letter dated October 22, 2004, Defendant told her attorney to vigorously pursue release of her Medicare records as she could not have a fair trial without them. *See attached hereto as exhibit B1.* Both defense attorneys assured the Defendant that subpoena had been properly prepared and served.

Unfortunately, Medicare had never received a subpoena for Defendant's Medicare records because defense counsel had failed to properly prepare a

subpoena which could be served. The subpoena prepared by defense attorneys was inadequate on its face, bearing an improper name and address. *See attached hereto as exhibit B7.* Both attorneys, however, lied to the Defendant on multiple occasions assuring her that they had in fact served the subpoena and had communicated with Medicare officials concerning Defendant's records and Provider number 000005300. Defendant was informed by her attorneys that the Medicare records she sought did not exist.

Without access to this information, the Defendant was unable to prove identity theft fraud and unable to present a defense to the charges contained in the Indictments and the Information. Dr. Mills had previously noted fraudulent material contained in Medicare correspondence linking her to unknown patients she had never treated. *See attached hereto as exhibit A42-A47.* She reasonably feared that without access to her complete Medicare file, she could be held responsible for indefinite crimes of which she had no knowledge. Had her attorneys truthfully informed her that they had not served Medicare subpoena, she could have made alternative attempts to obtain this vital information for her defense.

The negligence and indifference in the performance of their duties as Defendant's attorneys caused the Defendant to be prejudiced and to be denied fundamental fairness. [FN11]. But for

ineffective assistance of counsel, the Defendant would not have entered the plea of guilty to the offense of Making a False Statement.[FN12]

Defendant Mills has since received published communication from Medicare bearing unauthorized changes in her name and address, as well as erroneous effective and expiration dates for participation as a Medicare provider under Provider number 000005300. *See attached hereto as exhibit A48-A49.*

2) Defense Counsel Failed to Disclose Legal Memorandum

Defense counsel failed to disclose or to inform the Defendant of a Sentencing Memorandum filed March 2, 2005, by AUSA containing information which would have substantially affected the decision, comments and actions of the Defendant at her sentencing hearing. The Memorandum of approximately 8 pages included information relative to insurance companies, and alleged losses in excess of $84,000 for which the Defendant was ordered to pay restitution. The Memorandum clearly states that the government was unable to prove Defendant Mills generated or received the monies listed, nor caused the private insurance companies to sustain an actual loss. Said Memorandum makes reference to Orion Insurance Company although Orion had not been mentioned in the Indictments, Information, Pre-Sentence Investigation Report, or prosecutor's

"spreadsheets". *see attached hereto as exhibit A64-A72.* As a result, the Defendant was deprived rights of notice, confrontation, cross-examination, and the right to present contrary evidence to the allegations of Orion. [FN13].

Both defense attorneys advised Defendant to rely on two separate spreadsheets prepared by prosecutors for sentencing and they told Defendant to ignore the information in the Pre-Sentence Investigation Report. [FN15] *See attached hereto as exhibit* A57-A60. Names of insurance companies and corresponding monetary losses are inconsistent and in conflict with each other, and all are inconsistent and in conflict with information contained in the Sentencing Memorandum. *See attached hereto as exhibit A57-A60; A55-A56; and A64-A72.* Judge Perry denied any knowledge of spreadsheet data, and the totality of the numerous conflicting information caused the Defendant to be confused and uninformed in violation of U.S. Constitutional rights guaranteed to the individual accused of a crime. [FN13].

Therefore, both defense attorneys infringed on the rights of the Defendant to be fully informed and to be afforded an opportunity to contest information. Ineffective assistance of counsel caused the Defendant to be punished for crimes and losses sustained by unknown private insurance companies and having no nexus to the charge of making a false statement. [FN14].

Defense attorneys failed to provide the Defendant with the Memorandum until December 2005, almost one year after the Defendant had been sentenced. *See attached hereto as exhibit B8-B12.*

3) Attorneys Encouraged Coerced Guilty Plea

The Defendant maintained that she was innocent and did not want to enter a plea bargain agreement. At their initial meeting, the Defendant explained that her case would have to be tried as she had no intentions to enter a plea of guilty to any offense. Defense attorneys however, strongly encouraged the Defendant to plead guilty and finally convinced her that she had no reasonable alternative. Scott Rosenblum told Defendant that if she proceeded to trial, she would more than likely be convicted of at least one of the twenty-two counts of the Indictment, whether guilty or not, and would be sentenced to multiple years in prison. Defendant plead guilty to the offense of making a false statement to avoid the harsher punishment resulting from a conviction on any offense charged in the indictment.

The Defendant had begun to feel the pressure, stress and depression having been indicted of 22 counts of health care misconduct. Although she maintained her claim of innocence, the federal prosecutors, federal agencies and her defense attorneys urged, advised and warned the Defendant

that the documents she needed to prove identity theft fraud and her not guilty were unavailable and nonexistent. Medicare was able to ignore Defendant's repeated request for access, and federal prosecutors alleged that the government knew of no records corresponding to the Defendant as a Medicare provider or as having a DEA number. [FN10]. The government's CI had four bank accounts at the same bank as Defendant. Bank records from Brenda K. Mills, M.D. were withheld. All crimes committed by the CI in Defendant's name had also been concealed by federal prosecutors as they manipulated disclosure requirements by declaring Alice Jackson, a co-conspirator, a co-defendant or government witness.[FN10]. Prosecutors even denied the use of a Confidential Informant in discovery although prosecutors used a CI in probable cause to obtain a search warrant on January 24, 2003. All were said to be legitimate reasons to deny informing the Defendant as it would unduly infringe upon the rights of the government or the CI. Both defense attorneys, likewise advised Dr. Mills, that she had no right to any of the documents she had requested or the witnesses endorsed by the government, and therefore would not be given any information pertaining to said information until the weekend before trial as this was Jencks material. The only information shared with the Defendant was the Indictment itself, and the medical records already belonging to Dr. Mills, but seized from her office when raided by federal agents.

Defense attorney Scott Rosenblum became rude and hostile as he increased attorney fees by $50,000 to $75,000, for no other reason except the Defendant continued to request they proceed to trial. Mr. Rosenblum began to strongly encourage the Defendant to consider plea bargains about 60 to 30 days prior to the trial date. Defendant was again told that if she went to trial, she would more than likely be convicted on one count and would be sentenced to 6-7 years in prison. While encouraging Defendant to accept the plea of making a false statement, Mr. Rosenblum told Defendant that she would pay him or pay the court.

Defense attorney John Rogers managed to get the Defendant at a meeting without her husband and forced her to sign the plea agreement.

4) Defense counsel fail to properly advise the Defendant

Defense counsel improperly advised the Defendant causing her to enter a plea of guilty to actions which were not criminal or in violation of any federal law. The Defendant was under no legal duty to provide a licensed physical therapist and the alleged misrepresentation was not legally false. Dr. Mills had used nationally accepted CPT codes for billing purposes, and her attorneys were grossly negligent, indifferent or incompetent to have advised their client to admit guilt under the existing circumstances.

Mr. Rosenblum boasted that he was a specialist in the area of health care criminal defense, but improperly advised the Defendant that a conviction for the offense of making a false statement would not result in interruption of her medical license nor would she be excluded from participating in Medicare, Medicaid, and federally funded health care benefits programs.

Defense counsel improperly advised the Defendant to ignore the information contained in the Pre-Sentence Investigation Report. The Judge denied knowledge of spreadsheets prepared by prosecutors: however defense counsel advised the Defendant that spreadsheets would be the determining factor in consideration of restitution.

Failure by defense counsel to properly advise their client, Dr. Mills, has resulted in multiple years of pain and suffering, loss of livelihood and irreparable harm.

5) Defense Counsel Failed to Interview Witnesses and Failed to Evaluate Evidence

1) Defendant Mills provided the names of witnesses deemed necessary for her defense; however, defense counsel failed to contract and interview said witnesses. Without the witnesses available for her defense, the Defendant's ability to defend herself was weakened and the Defendant was

coerced into entering a plea of guilty. Specifically, Geraldine Liston, Clara Witt, and Jacklene Moore would have provided favorable testimony for the Defendant.

Likewise, defense counsel failed to investigate, obtain and develop evidence identified favorable by the Defendant. The Defendant was kept in the dark most of the time right to the day she entered her plea, but she had heard numerous rumors concerning the CI, other witnesses and events which possibly could have cleared her. She shared her suspicions and the rumors in the community with her attorneys and expected them to consider the information and use it if beneficial. Such information could have been used to strengthen or to build a defense. Defense counsel criticized Defendant's suggestions and failed to follow up on the leads. Defendant had learned, however, that some of the strategies she considered would have produced valuable evidence as proof of Defendant's innocence and would have weakened the case against her. 1) Defendant learned that someone had used her forged signature to defraud the taxi cab commission by issuing fraudulent examination results of multiple taxi cab drivers. Defendant suggested that various taxi drivers be interviewed as many of them had confirmed that an extensive scheme to defraud operated using Defendant's stolen identity. *See attached hereto as exhibit B19.* Defense counsel failed to explore and refused to interview taxi cab drivers identified by the Defendant.

Defendant had provided Mr. Rosenblum with names, addresses and phone numbers of at least 40 taxi cab drivers.

6) Defense Counsel failed to follow directions of his client

In initial meeting with Mr. Rosenblum, Defendant Mills told her attorney to subpoena her Medicare records as they would prove identity theft fraud. Subsequently, Defendant reminded her attorneys on multiple occasions to subpoena Medicare. In letter dated, October 22, 2004, Defendant told her attorney to vigorously pursue release of her Medicare records as she could not have a fair trial without them. *See attached hereto as exhibit B1.* Defense counsel in a criminal prosecution, has a professional responsibility to follow the direction of his client. [FN18]. Also, the theory of defense belongs to the Defendant, for it is he or she who suffers the consequences if it fails; an assistant [sic] of counsel is just that. [FN13].

Defense attorneys failed to subpoena bank accounts in name of Brenda K. Mills, M.D.

Defense attorneys failed to file affidavits from the 20 people on the indictment although Defendant had provided him with affidavits stating they had received and were satisfied with the services provided to them by Dr. Mills prior to receiving their final settlement check.

Mr. Rosenblum failed to file remittance notices on CC with the court after defendant informed him what she had plead guilty to out of duress was incorrect. *See attached hereto as exhibit A13-A34 and exhibit B26-B34.* Defense counsel failed to file objections defendant had prepared to the PSR with the court that defense counsel said he would file. *See attached hereto as exhibit B24-B25.* Mr. Rosenblum failed to withdraw defendant's guilty plea; instead told defendant to wait to see what the prosecutor's objections would be before withdrawing the plea and then when the prosecutor's objections came out in the form of a memo, he withheld the memo. During sentencing, when defendant stated she did not understand the PSR and wanted a hearing, defense attorneys told her sentencing could only get worse because the Judge was not going to let her see the checks and endorsements, while at the same time withholding the memorandum.

Motion is Not Untimely

In December 2005, the Defendant received the first written response to her request for Medicare records. *See attached hereto as exhibit A48-A49.* The Defendant made a written request by certified mail in December 2003. A second written request, also certified receipt, was sent in January 2004. *See attached hereto as exhibit A42-A47.* All due diligence including written request to her attorneys on October 22, 2004, was made by Defendant specifically identifying the information needed and

reason thereof. *See attached hereto as exhibit B1.* Nonetheless, the Defendant was denied access although entitled to this information. Defendant notified the Judge in a post conviction filing within one year of sentencing of the newly discovered evidence but was denied an evidentiary hearing. [FN6]. *See attached hereto as exhibit B16-B18.* Defendant filed several appeals to FOIA and DHHS-OIG regarding these Medicare records. *See attached hereto as exhibit A1-A120.* Her last correspondence was from DHHS-OIG on March 23, 2007, stating they were unable to locate the Medicare records and they referred her back to CMS, whom she had already appealed. *See attached hereto as exhibit B43 and exhibit B38-B39.* This shows that Defendant is being bounced around from one agency to another agency. Defendant's appeal is not untimely because she is still waiting for her Medicare records from the government.

As of this filing, Defendant is under supervised release.[FN17]

Conclusion

Defendant Mills, a licensed physician in the State of Missouri, was the target of a federal investigation which culminated in her indictment and eventual plea of guilty to Making a False Statement to a federal agent. Dr. Mills believes that the legal proceedings in her prosecution were conducted in a manner rendering them

fundamentally unfair in that she was blatantly denied due process of law and equal protection. Material evidence was concealed, withheld, altered and misrepresented, and the Defendant was refused access to information to which she was entitled.

The government was unable to prove that the Defendant participated in criminal activity involving publicly funded health care programs, and likewise, the government could not sustain the burden of proof for a conviction involving private insurance companies. Nonetheless, the Court ordered Dr. Mills to pay more then $84,000 for restitution although the DOL made payments to Defendant totaling less than $2500.00 for the entire claim and less than $500.00 for physical therapy treatments.

As a result of Defendant's coerced plea, the Inspector General excluded the Defendant from participation in Medicare, Medicaid, and federally funded health care benefits programs for five years, and then when she appealed, for ten years for no other aggravating factors. Administrative agencies failed to afford the Defendant access to information to which she was entitled and further, violated their own Congressional authorities, duties and safeguards.

The Judgment and Sentence entered March 4, 2005, are improper and unlawful on grounds that the Court lacked subject matter jurisdiction, and the Defendant was subjected to prosecutorial

misconduct, ineffective assistance of counsel, and arbitrary and capricious actions by Administrative agencies, which together and separately caused irreparable and ongoing damages to the Defendant and substantial loss of life, liberty, and property.

Defendant continues to suffer adverse consequences of the conviction, i.e., adverse employment reactions, denial of occupational licenses, loss of voting rights and civil rights. Defendant's civil rights were violated in that she was prosecuted for not having a licensed physical therapist administer treatments that other doctors in the medical profession nationwide are allowed to legally have an unlicensed worker under their supervision administer. The DHHS-OIG that had no problems sanctioning Defendant in post conviction proceedings by excluding her from participating in Medicare, failed to provide her with the Medicare documents needed to defend herself against the initial charges. Defendant has exercised due diligence during the investigation, prosecution, and post conviction proceedings in trying to obtain the Medicare records needed to prove her innocence, however, as of this filing, she has not received those records.

WHEREFORE, Defendant Brenda Mills, M.D., prays that this Court enter an order allowing the withdrawal of the Plea of Guilty entered on November 8, 2004. Defendant moves the Court to vacate, set aside or alternatively correct the sentence imposed on grounds of

jurisdiction, due process and fundamental fairness violations, prosecutorial misconduct obstructing justice and ineffective assistance of counsel. Defendant Mills further moves this Court to reverse the Findings and Decision of the Department of Health and Human Services and order that the Defendant be granted access to Medicare records improperly withheld, and further, that said records be changed to reflect accurate information as provided by the Privacy Act of 1974 and other established legal authority. The Defendant finally moves the Court for all such orders which are deemed fair and just under the circumstances and in accordance with the United Stated [sic] Constitution.

CASE LAWS [SIC] AND OTHER LEGAL AUTHORITIES

[FN1], Article III, Section 2 of U.S. Constitution extends to federal courts power to hear cases that involve the Constitution and federal laws . . . See FRCP 12(b)(2) "defenses that the indictment or information fail to show jurisdiction or to charge an offense shall be noticed by the court at any time." See U.S. v. Cotton 535 U.S. 625 (2002) (the term "jurisdiction" means today, i.e. , "the courts' statutory or constitutional power to adjudicate the case". Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 89 (1998). This latter concept of subject matter jurisdiction, because, it involves a court's power to hear a case can never be forfeited or waived. Consequently, defects in subject matter jurisdiction require correction regardless of whether the error was raised in district court." See U.S. v. White 258 F.3d 374, 379 (5th Cir. 2001); Bowen v. Johnston 306 U.S. 19, 24; Machibroda v. U.S 368 U.S. 487; Kaufman v. U.S. 394 U.S. 217. 222; (the entry of a guilty plea does not act as a waiver of jurisdictional defects...the defendant may raise

such failure at any time (by habeas corpus or by corum nobis). See U.S. v. Adeisa 129 F.3d 846, 850 (6th Cir. 1997) "matters of jurisdiction may be raised at any time, because if a court lacks subject matter jurisdiction it does not have the power to hear the case." See U.S. v. Fisher, 6 U.S. 358; Williams v. Louisiana, 103 U.S. 637 (It is the duty of the court to uphold the constitution they have sworn to support, not the rules of procedure). See Shelley v. Kraemer, 334 U.S. 1; Scott v. Sandford 60 U.S. 393. (The court cannot decline to rule on a constitutional challenge.) See Muskrat v. U.S. 219, U.S. 346; Smith v. U.S. 360 U.S. 1 (court proceeding must be within constitutional provisions.) See World Wide Volkswagen v. Woodson, 444 U.S. 2886; National Bank v. Wiley, 195 U.S. 257; Pennoyer v. Neff 95 U.S. 714 (a judgment rendered in violation of due process is void) See FW/PBS v. Dallas, 493 U.S. 215 (the party asserting the federal court has jurisdiction has the burden of proving it)

[FN2] Mikes v. Strauss 274 F.3d 687 (2nd Cir. 2001)(The legally false certification theory is predicated upon a false representation to compliance to a federal statute, regulation or contractual term as a precondition to government payment.)

[FN3] See USAM Criminal Resource Manual 912 Falsity Section 1001 of title 18, USC, requires the statement or representation actually be false, and the government has the burden of establishing the alleged falsity of the statement. Although a statement may be misleading, unauthorized or even fraudulent, a conviction under this section generally cannot be sustained unless the statement is also false. See U.S. v. Diogo, 320 F.2d 898, 905-09 (2d Cir. 1963). "A false or fictitious statement or representation is an assertion

that is untrue when made or when used, and that is known by the person making it to be untrue. U.S. v. Worthington, 822 F.2d 315, 319 (2d Cir.), cert. denied, 484 U.S. 944 (1987). A fraudulent statement or representation is an assertion that is known to be untrue and that is made or used with intent to deceive. Id., ; 2 E. Dewitt, C. Blackman and K. O'Malley, Fed. Jury Practice and Instructions, section 37.08 (1990)" See USAM Criminal Resource Manual 910 Knowingly and Willfully " The prohibition of 18 USC Section 1001 requires that the false statement....be knowingly and willfully done, which means the statement must have been made with a intent to deceive, a design to induce belief in the falsity or to mislead, but 1001 does not require an intent to defraud...U.S. v. Lichenstein, 610 F. 2d 1272, 1276-77 (5th Cir.) cert denied, 447, U.S. 907 (1980). The government may prove that a false statement was made knowingly and willfully by offering evidence that defendants acted deliberately and with knowledge that representation was false. See U.S. v. Hopkins, 916 F.2d 207, 214 (5th cir. 1990). As used in the statute, the term knowingly requires only that the defendant acted with knowledge of the falsity. See U.S. v. Lange, 528 F.2d, 1280, 1287-89 (5th cir. 1976). An act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids." See Bryson v. U.S. 396 U.S. at 69-70; U.S. v. Lange 528 F.2d 1288-89 (5th Cir. 1976) (in order to violate section 1001 the defendant must make a false statement knowingly and willfully, I.e. "he must know his statement is false at the time he makes it."). See U.V. v. Vessas, 586 F.2d 101 (8th Cir. 1978) (18 USC section 1001 - an indictment for making false statements under oath was fatally defective because a statement alleged as false was legally true. Defendant represented that he and his mother not joint tenants. Because

his mother was deceased at the time and since a deceased person cannot be a joint tenant, the statement was legally true.) U.S. v. Hixon, 987 F.2d 1261 (6th Cir. 1993) 18 USC sect. 1001 - a statement that the defendant was not self-employed was true even though he was employed by his self-owned corporation, and thus he could not be guilty of making a false statement.)

[FN4] USAM Criminal Resource Manual 907 Statements Warranting Prosecution states, "All that is necessary for jurisdiction is that the false statement touch on a Federal interest, i.e. it affect or influence that interest. The only limitation on this rule is that the Federal interest must exist at the time the false statement is made; it cannot arise after the defendant has made a false statement. Once federal jurisdiction has been determined issues of materiality, knowledge and falsity arise."

[FN5] USAM Criminal Resource Manual 911 Materiality states, "to establish materiality as an element it is sufficient that the statement have the capacity or natural tendency to influence the determination required to made. See U.S. v. Lueben, 838 F.2d 751, 754, (5th Cir. 1980); U.S. v. Allen 892 F.2d 66, 67 (10th Cir. 1989).

[FN6] See U.S. v. Fisher, 6 U.S. 358; Williams v. Louisiana, 103 U.S. 637 (It is the duty of the court to uphold the constitution they have sworn to support, not the rules of procedure.) "The movant should not be barred from an appropriate remedy because he has misstyled his motion. See U.S. v. Morgan, 346 U.S. 502, 505 (1954). The court should construe it as whether one is proper under the circumstances and decide it on its merits. For a 2255 motion

construed as a rule 35 motion, see Heflin v. U.S. 358 U.S. 415 (1959); and U.S. v. Coke 404 F.2d 836 (1968). For a writ of error coram nobis treated as a rule 35 motion, see Hawkins v. U.S. 324 F. Supp 223, (E.D. Texas Tyler Division (1971). For a rule 35 motion treated as a section 2255 motion, see Mass. v. U.S. 263 F. 2d. 625 (5th Cir. 1959); Jones v. U.S. 400 F.2d 892 (8th Cir. 1968), cert. denied 384 U.S. 991 (1969); and U.S. v. Brown, 413 4.2d 878 (9th Cir. 1969) cert denied 397 U.S. 947 (1970).

[FN7] "A judgment rendered in violation of due process is void". World Wide Volkswagen v. Woodson, 444 U.S. 2886, 291; National Bank v. Wiley, 195 U.S. 257; Pennoyer v. Neff, 95 U.S. 714. See Magna Carta, " No free man shall be taken, or imprisoned, or diseased, or outlawed, or exiled or any wise destroyed, nor shall we go upon him nor send upon him but by...the law of the land. Due process is the evolutionary heir to the law of the land. Buchalter v. N.Y. 319 U.S. 427; The Constitution of the U.S., U.S. Printing Office (1973) p. 1137-1145. "Due process is violated if a practice or rule offends some principle of justice so rooted in the tradition and conscience of our people to be ranked as fundamental." Synder v. Mass 291 U.S. 97, 105. See Muskrat v. U.S. 219, U.S. 346; Smith v. U.S. 360 U.S. 1 (court proceeding must be within constitutional provisions.)

[FN8] See Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963) "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment irrespective of good faith or bad faith of the prosecution. When the prosecutor receives a specific and relevant request for exculpatory evidence the failure to make

any response is seldom, if ever excusable." The Agurs court also noted "if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made." See Kyles v. Whitley, 514, U.S. 419 (1995) (the government may not suppress evidence favorable to a defendant). See U.S. v. Auten 632 F.2d 478, 481 (1980), citing U.S. v. Trevino, 556 F.2d 1265 (5th Cir. 1977), U.S. v. Antone 603 F.2d 566, 569 (5th Cir. 1979), "we cited Deutsch as authority for the declaration that we decline to draw a distinction between different agencies under the same government, focusing instead upon the prosecution team which includes both investigative and prosecutorial personnel. We conclude that the government did have knowledge for purposes of disclosure requirements,...and that it withheld or suppressed the available information". See Williams v. Whitley, 940 F.2d 132, (5th Cir. 1991)(Knowledge of government agents of exculpatory evidence is imputed to the prosecution. Therefore, if government agents have exculpatory evidence this is the same as the prosecutor having it an it must be turned over to the defense.) See Kyles 115 S. Ct. at 1566(1995) (the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf). See U.S. v. Brooks, 966 F.2d. 1500 (D.C. Cir. 1992) (discusses duty of prosecutor to search files of other agencies) See Corey v. Duckworth, 738 F. 2d. 875 (7th Cir. 1984) (prosecution cannot evade Brady requirements by keeping itself ignorant of information.)

[FN9] See U.S. v. Sanchez 429 F.3d 753 (8th Cir. 2005) "Under Roviaro, 353 U.S. at 60-61, the government has an obligation to disclose the identity of a confidential informant

"where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." We have elaborated on the circumstances in which this duty applies, holding that if the informant is an active participant in the conduct charged, the informant's identity is "almost always" material and thus the government must "make every reasonable effort to have the informant made available to the defendant" citing U.S. v. Barnes, 486 F/2d 776, 779-80 (8the Cir. 1973); cf Roviaro, 353, U.D. at 65 n.15."

[FN10] Brady v. U.S., 397 U.S. 742, 748, 755-56(1970) (held that a plea is voluntary if it is not induced by threats, misrepresentation. The Court held that a plea is intelligent when a defendant is advised by competent counsel, is aware of the charge against him and likely consequences of the plea and is not incompetent or otherwise not in control of his mental faculties).

[FN11] Strickland v. Washington, 466 U.S. 668, 688, 692 (1984) (to prevail on a claim of ineffective assistance of counsel, defendant must prove(1) that her counsel's performance fell below an objective standard of reasonableness, and (2) that the deficiency in her counsel's performance prejudiced her. Prejudice is established if there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.) See DeRoo v. U.S. 223, F.3d 919, 923-24 (8the Cir. 2000) "a decision to enter into a plea agreement cannot be knowing and voluntary when the plea agreement itself is the result of

advice outside the range of competence. Therefore, justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a plea agreement cannot be barred by the agreement itself - the very product of the alleged ineffectiveness."

[FN12] See Hill v. Lockhart, 474 U.S. 52 (1985)(Strickland standard applies to guilty plea challenges based on ineffective assistance of counsel. In order to satisfy the Strickland prejudice standard, the defendant must show that there was a reasonable probability that, but for counsel's errors, she would not have pled guilty and would have insisted on going to trial.)

[FN13] See Faretta v. California, 422 U.S. at 818-20(1974), "The Sixth Amendment includes a compact statement of rights necessary to a full defense: In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the assistance of counsel for his defense. . . . The rights to notice, confrontation and compulsory process when taken together guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice - through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses and the orderly introduction of evidence . . . The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be informed of the nature and cause of the accusation, who must be confronted with

the witnesses against him and who must be accorded compulsory process for obtaining witnesses in his favor....The right to defend is given directly to the accused, for it is he who suffers the consequences if the defense fails. . . . The counsel provision supplements this design. It speaks of the assistance of counsel, and an assistant, however expert is still an assistant."

[FN14] Cole v. Arkansas, 333 U.S. 196, 210 (1949) "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." See U.S. v. Gobert, 139 F.3d 4366 (5th Cir. 1998 (where there was no evidence of a nexus between the gun and the drugs, the defendant's guilty plea to his firearm charge would be reversed.)

[FN15] See U.S. v. Huff, 512 F.2d 66 (5th Cir. 1975) sentencing was improper where it was based upon a memorandum from the prosecution, outside the record, without giving the defendant the opportunity to rebut it.)

[FN16] See Hughey v. U.S. 495 U.S. 411, 110 S. Ct. 1979, 109 L. Ed. 2d 408 (1990) (The language and structure of the Victim and Witness Protection Act of 1982 make plain Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the conviction. The restitution a court may grant under VWPA is limited to the losses arising out of the specific conduct that is the basis of offense of conviction). See U.S. v. Cockerham 919 F.2d 286 (5th Cir. 1990). (Restitution based on offenses for which the defendant is charged but not convicted is inappropriate). See U.S. v. Young 903 F.2d 1288 (11th Cir.

1992) (The court could not order restitution for losses caused by crimes other than those to which the defendant pled even though that was provided for in the plea agreement) See U.S. v. Messner 107 F.3d 1448 (10th Cir. 1997) (Unlike the sentencing guidelines which allows a court to consider actual or intended loss for purpose of sentencing, an award of restitution must be based on amount of loss actually caused by the defendant's offense). See U.S. v. Santos 93 F. 3d 761 (11th Cir. 1996) (defendant could not be ordered to pay restitution on unconvicted crime)

[FN17] Hensley v. Municipal Ct. 411 U.S. 345, 93 S. Ct. 1571 (1973) (discussing meaning of custody in context of 2254 requirements) See Jones v. Cunningham 371 U.S. 236 (1963)(finding the restraints of parole sufficient to constitute custody for purposes of habeas corpus proceeding under 2254) See Azzone v. U.S. 341 F.2d 417 (8th Cir. 1965) (applying the custody requirement in 2255 proceedings)

[FN18] American Bar Association Model Rules of Professional Conduct Rule 1.1 Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for representation. Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer (a) . . . a lawyer shall abide by a client's decisions concerning the objectives of representation and as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. Rule 1.4 Communication (a) A lawyer shall (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in

Rule 1.0(e), is required by these Rules. (4) promptly comply with reasonable requests for information

Respectfully Submitted,

/s/
Brenda Mills, M.D.
Defendant, Pro Se
5824 DeGiverville Avenue
St. Louis, Missouri 63112
(314) 265-7651

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Docket No. 4:08CR0060
BRENDA MILLS, MD.	)	
Defendant.	)	

ORDER

Having fully considered the motion,

IT IS HEREBY ORDERED that defendant Brenda Mills' Motion to Reconsider Order of Restitution [#129] is denied.

/s/
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 22nd day of March, 2006.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF MISSOURI
ST. LOUIS DIVISION

BRENDA MILLS, M.D.,	)	
	)	
Petitioner,	)	4:08CV310
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

Motion to Reconsider Order of Restitution

Comes now defendant, Brenda Mills, M.D., pro se, and for her motion to reconsider the order for restitution respectfully states that there are multiple factors, both relevant and material to the issue of restitution, which have come to light subsequent to the sentencing hearing, and defendant respectfully states the following for her motion, to wit:

Newly discovered evidence: Defendant, Brenda Mills, M.D., recently obtained newly discovered evidence which substantially impacts her sentence as it relates to restitution. This new information provides a basis for adjustment, modification or elimination of restitution as ordered

be the Court at the sentencing hearing March 4,2005.

A) Defendant, Brenda Mills, M.D., recently learned of a legal memorandum which was filed under seal and submitted to the Court just two days prior to sentencing. This memorandum contained an attachment which listed and identified alleged victim insurance companies with corresponding monetary losses. The insurance companies and losses named in the attachment, however, were inconsistent with the names and loss amounts charged in the indictments, and also inconsistent with names and totals stated in the presentence investigation report. Even more inconsistencies and conflict appear in the two separate spreadsheets produced by governmental authorities in January and February, 2005.

Although in the possession of her attorneys, the memorandum and the attachment list was never given to defendant, Brenda Mills, M.D., nor discussed with her. Failure to have this information made it impossible for her to make an informed decision and to correctly answer the questions asked her by the judge.

Despite repeated attempts and requests to see checks and endorsements attributed to her, defendant, Brenda Mills, was never allowed to examine the documents which she is being held responsible for. In addition to the inconsistent and

conflicting reports, there is no dispute that communications such as billing and checks were sent to Alice Jackson at Post Office Box defendant Brenda Mills knew nothing about.

B) Defendant, Brenda Mills, M.D., has recently obtained evidence from Medicare which clearly indicates that erroneous information is being held and used against her. Despite numerous requests and demands for her file and records pertaining to Provider No. 000005300, only recently, and subsequent to being sentenced, did defendant received documentation indicating her account was opened in 1991 and closed in 1992. The address used for that period of time is 511 Airport Road. However, the defendant did not purchase the building at that address until 1994, proving that someone has altered and falsified her records and continues to do so. Defendant received communication from Medicare in 2003 for services rendered to a person unknown to her. Medicare denies having any records except for the years 1 1991 thru 1992. Additionally, Medicare states there are no records retained from her actual file which she had personally initiated in 1988.

Financial Hardship: The investigation and Court proceedings caused defendant, Brenda Mills, M.D., to lose all means of livelihood. The building which housed her medical practice and daycare was foreclosed on, ending financial gain from those sources, and her employment often years was terminated upon being charged with multiple felony

counts. Although the defendant worked diligently to have her license to practice medicine in the State of Missouri reinstated, job offers have been rescinded because Medicare has now excluded here from participation in any health care related work. Ironically, had Medicare provided records to defendant as requested pursuant to the Freedom of Information laws, she would have been able to prove that she was not responsible for losses to the insurance companies and actually had no knowledge or participation in the acts for which she has been ordered to pay restitution.

Defendant, Brenda Mills, M.D., does not have the ability to earn or borrow the $200.00 required each month for restitution payments. She has recently filed bankruptcy and does not have the means to pay for housing, food and other necessities. Although wanting to abide by the Court order, defendant, Brenda Mills, M.D., simply can not make payments of any amount, and therefore, request that this Court grant this motion to reconsider the order of restitution.

Ineffective Assistance of Counsel: Had the attorney for defendant, Brenda Mills, provided her with the contents of the memorandum addressing the issue of restitution she would have been able to make informed decisions and respond with correct answers to the questions asked of her at the sentencing hearing. Defendant believes she was denied her rights of confrontation by her attorney's

actions. The information contained in the memorandum would have made it clear that inconsistencies and the refusal to show defendant proof (issued checks, endorsements and payment records) precluded her from disputing claims for restitution.

In addition to withholding the memorandum for restitution, defendant's attorney lied to the defendant stating repeatedly prior to the trial date, that he had served subpoenas for Medicare records. The defendant had informed her attorney that those records were vital to her defense on numerous occasions. Those records would have allowed the defendant to show that others were conducting business in her name and without her knowledge. This is evidenced by erroneous records being held and published by Medicare, as well as communications being sent and received to addresses and a Post Office Box the defendant knew nothing about. Defendant's attorney told her to ignore the names of insurance companies and the amounts of loss listed in the presentence investigation report. Instead she was told to concentrate on the information contained in the spreadsheets. However, restitution was ordered based on the information contained in the PSR and the memorandum she did not see until after being sentenced. None of the reports relied upon were consistent with each other or the amount of moneys received by the defendant.

WHEREFORE, defendant Brenda Mills, M.D., respectfully moves this court to grant her motion for the reconsideration of restitution and further moves this Court to make any other order deemed fair and appropriate under the circumstances.

Respectfully submitted,

/s/
Brenda Mills, M.D., Pro Se

[Dated: March 6, 2006]